IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 16, 2006 Session

ROBERT E. TATE v. WESTERN EXPRESS, INC.

Appeal from the Chancery Court for Davidson County
No. 04-922-III Ellen Hobbs Lyle, Chancellor

No. M2006-00650-COA-R3-CV - Filed on May 18, 2007

The trial court dismissed a buyer's counterclaim under an asset purchase agreement. The buyer's counterclaim was an effort to recover from an individual party to the agreement for amounts buyer spent in satisfaction of seller's debts although buyer did not assume such liabilities as well as other costs or losses associated with the asset purchase. Based on the obligations undertaken by the individual and the record before us, we affirm the trial court's grant of summary judgment to the individual as to some claims and the grant of Rule 41.02 dismissal of the other claims.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Isham B. Bradley, Nashville, Tennessee, for the appellant, Western Express, Inc.

Richard L. Colbert, Courtney L. Wilbert, Marty S. Turner, Nashville, Tennessee, for the appellee, Robert E. Tate.

OPINION

This case involves interpretation of an asset sale agreement and the liability of a shareholder of the seller who was a party to the agreement for limited purposes. The sellers were Deaton, Inc., a trucking company located in Alabama, and its property holding company, C&H Holding, Inc. For purposes of this opinion, Deaton, Inc. and C&H Holding, Inc. shall be referred to collectively as "Deaton." Robert Tate was a shareholder in C&H Holding, Inc.

I. BACKGROUND

In early 2003, Deaton was suffering severe financial problems. Western Express, Inc. ("Western Express"), a truck load carrier, entered into an Asset Purchase Agreement dated March

31, 2003 ("Agreement") with Deaton whereby Western Express purchased substantially all of the Deaton operating assets, including the assets of C&H Holding, Inc. Western Express did not purchase any of Deaton's contracts or any ownership interest in Deaton. With regard to Deaton's liabilities, Western Express agreed to assume only a very few select and specified liabilities.

Robert Tate was a party to the Agreement for limited purposes. Together with two other shareholders, Mr. Tate was identified in the Agreement as a "Principal." The Principals' obligations under the Agreement were quite narrow; they made certain representations and warranties in the Agreement. Although a shareholder, Mr. Tate had no day-to-day role in the operations of Deaton.

The suit was originally filed by Mr. Tate against Western Express to recover approximately $200,000 owed to him by Western Express. Western Express did not dispute its obligation to Mr. Tate. The trial court entered a judgment against Western Express awarding Mr. Tate $219,998.94. This award to Mr. Tate is not disputed and is not the subject of this appeal.

Western Express, however, counterclaimed alleging that Mr. Tate was liable to Western Express under the Agreement for several items. The counterclaim is the subject of this appeal. The counterclaim brought by Western Express was primarily an attempt to recover from Mr. Tate losses or costs incurred by Western Express as a result of its purchase of Deaton's assets. After it entered into the Agreement, Western Express experienced unexpected problems arising from Deaton's financial situation. For example, it appears that Deaton left several third party businesses unpaid, and Western Express paid some of those businesses. In addition, Western Express also claimed Mr. Tate was liable under the Agreement for the value of tractors and trailers Western Express purchased from Deaton but did not receive.

The Chancery Court granted Mr. Tate summary judgment on six of the claims raised by Western Express. Thereafter, at the trial of the remaining two claims, the trial court granted Mr. Tate a judgment at the conclusion of Western Express's proof in accordance with Rule 41.02 of the Tennessee Rules of Civil Procedure. Western Express appeals both the grant of summary judgment and the dismissal under Rule 41.02.

II. CONTRACT INTERPRETATION

All of the claims raised by Western Express against Mr. Tate have their genesis in the obligations Mr. Tate undertook pursuant to the Agreement. Whether Western Express is successful in its counterclaim depends upon interpretation of selected sections in the Agreement that Mr. Tate agreed to as a Principal. The question of interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc*, 995 S.W.2d 88, 95 (Tenn. 1999). Therefore, the trial court's interpretation of a contractual document is not entitled to a presumption of correctness on appeal. *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000). This court must review the document ourselves and make our own determination regarding its meaning and legal import. *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

Our review is governed by well-settled principles. "The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). The court's role in resolving disputes regarding the interpretation of a contract is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language used. *Guiliano*, 995 S.W.2d at 95; *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975).

In order to analyze the issues on appeal, we will first address the claims dismissed under the summary judgment order and then the claims dismissed under Rule 41.02.

III. SUMMARY JUDGMENT ORDER

Western Express sought recovery from Mr. Tate for amounts it paid Home Depot, Werner Cargo, Boyd Brothers, Liberty Truck Insurance, Moulton Allen, and Williams, and Daniel's Body Shop that had allegedly been incurred by Deaton. These claims were the subject of the trial court's order granting Mr. Tate summary judgment.

The standards for our review of a summary judgment decision are well settled. This court must review the record without a presumption of correctness to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000). The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair*, 130 S.W.3d at 764. Thus, summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Goodloe v. State,* 36 S.W.3d 62, 65 (Tenn. 2001).

We must consider the evidence in the light most favorable to the non-moving party, and we must resolve all inferences in the non-moving party's favor. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001), *cert. den.*, 534 U.S. 823, 122 S.Ct. 59 (2001). In the case before us, the evidence must be applied to the obligations established in the Agreement. As explained above, the resolution of this case depends in large part on the interpretation of that contract.

After the asset sale was accomplished, Western Express learned that Deaton had left several third party businesses unpaid. When these third parties learned that Western Express had purchased Deaton's assets, they held Western Express responsible for Deaton's debts. Western Express had not agreed to assume these debts in the Agreement, and it does not appear that Western Express was otherwise legally obligated to pay these debts. Due to their ongoing business relationship with

Western Express, however, these third parties were in a position to extract payment from Western Express in various ways that will be described later.

A. Home Depot, Werner Cargo, and Boyd Brothers Claims

After the sale of assets, Western Express paid Werner Cargo, $12,709.80 and Home Depot, $21,440.03 for cargo claims, *i.e.* freight allegedly damaged by Deaton. In addition, Western Express paid Boyd Brothers, $10,000 for tarping expenses allegedly owed by Deaton. Western Express had not purchased Deaton's contracts with these entities and had not agreed to assume these liabilities in the Agreement.

Unbeknownst to Western Express, when the parties signed the Agreement Deaton apparently owed Home Depot, Werner Cargo, and Boyd Brothers. Western Express also did business with all of these companies. When Home Depot and Warner Cargo learned that Western Express had purchased Deaton's assets, both companies simply collected the debt owed Deaton by reducing its payments to Western Express on unrelated business. On the other hand, Western Express elected to pay the Boyd Brothers' bill because Boyd Brothers was the required tarping company of U.S. Gypsum. According to the brief filed by Western Express, U.S. Gypsum required Western Express to use Boyd Brothers to tarp all loads of US Gypsum products. Boyd Brothers would not do business with Western Express until it paid Deaton's outstanding bill. Consequently, Western Express could not keep the U.S. Gypsum business unless it paid Boyd Brothers the amount Deaton allegedly owed it.

The trial court granted Mr. Tate summary judgment for these claims. Western Express maintained that since Mr. Tate misrepresented the existence of threatened claims against Deaton, he was liable to Western Express for amounts paid by Western Express in satisfaction of Deaton's debts to these vendors.

The parties agree that Mr. Tate's liability for these claims is governed by Section 6.1(c) of the Agreement, which provides in pertinent part as follows:

> SECTION 6.1 REPRESENTATIONS AND WARRANTIES OF SELLERS AND PRINCIPALS. Sellers and **Principals** represent and warrant to Buyer as of the date hereof and as of any Interim Closing or the Closing, as follows:
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> . . .
>
> (c) Litigation. There are no Actions pending or **to the best of** Seller's and **Principals' knowledge, threatened** by or against the business or affecting any of the Acquired Assets (other than those arising in the usual course of Sellers' business, including, but not limited to, lawsuits for freight charges and for freight loss and damage or due to accidents involving operation of the Acquired Assets) for which the

> Sellers maintain insurance in full force and effect to cover any such claims or loss as of the Effective Date. (emphasis added).

The trial court found that the representation contained a qualifier that relieved Mr. Tate from liability under the provision. While Mr. Tate represented that there were no threatened actions, he did so to the best of his knowledge. Mr. Tate's involvement in Deaton was financial only. Since it was undisputed that Mr. Tate did not know or could not have known about these claims, then the trial court found Mr. Tate did not violate Section 6.1(c) and granted Mr. Tate summary judgment on these three claims. We agree.

On appeal Western Express appears to argue that the existence of insurance under Section 6.1(c) is determinative. The representation, as written, covers only insured losses. As we interpret the provision, Mr. Tate represented that, to the best of his knowledge, that there were no threatened "Actions" against the business that did not arise in the ususal course of business and were covered by insurance. The unpaid bills to the three businesses at issue do not fit this description. Consequently, dismissal of the claims arising from the payments discussed herein was justified on grounds in addition to the reason cited by the trial court.

Having agreed with the trial court that Mr. Tate is not liable under Section 6.1(c) for the amounts paid by Western Express to Home Depot, Boyd Brothers and Werner Cargo, the summary judgment as to those claims is affirmed.

B. Liberty Truck Insurance and Moulton, Allen & Williams' Claims

These two claims involve Western Express's attempt to recover against Mr. Tate for insurance premiums. Western Express alleges it paid $14,391.05 to Liberty Truck Insurance ("Liberty") and $11,376 to Moulton, Allen & Williams for insurance premiums to provide coverage for owner/operator drivers who drove trucks for Deaton. According to Western Express, Deaton had withheld these amounts from its truck owner/operators but had failed to pay these premiums. The Agreement did not require Western Express to assume these obligations of Deaton.

Western Express claims it was forced "by business necessity" to pay these accounts. According to Western Express, if it had not made the insurance premium payments then the affected owner operators would not drive trucks for Western Express. The trial court granted Mr. Tate summary judgment since he was not responsible to Western Express for the amounts under the Agreement.

On appeal, Western Express claims Mr. Tate is liable to it for these claims under Section 7.1(a)(b) and (d) of the Agreement.

> SECTION 7.1 PRE-CLOSING ACTIVITIES. From and after the date of this Agreement until the closing, Sellers and Principals agree to do and refrain from doing the following:

(a) Sellers and Principals shall not take any action that would prohibit or materially impair ability to consummate the transactions contemplated by this Agreement.
(b) Any operation of the Business by Sellers and Principals shall be in the ordinary course of business and consistent with past practice with no material change in business operations.

. . .

(d) Sellers and Principals shall cooperate and assist Buyers efforts to retain the services of those employees of Sellers that are involved in any manner with the operation of the Acquired Assets (the "Active Employees") (provided, however, Sellers shall not be required to increase the compensation of any Active Employee outside of the ordinary course of business). Similarly, Sellers and Principals shall use its best efforts to preserve the goodwill of the drivers and customers affecting the Acquired Assets and others having business relations affecting the Acquired Assets.

The trial court found that liability under these provisions was premised on affirmative action by Mr. Tate, a Principal, such as operating the business. Each provision in Section 7.1(a)(b)and(d) addresses how the business will be operated. As discussed earlier, the parties agreed Mr. Tate was not involved in operations. The Principals agreed to cooperate and assist Western Express and to use their best efforts to preserve the goodwill of the employees. We find nothing in the obligations undertaken by Mr. Tate in the quoted provisions that would create liability on his part for the payments at issue.

We affirm the trial court's grant of summary judgment on these two claims.

C. Daniel's Body Shop

Western Express paid $15,152.46 for repairs to a tractor for Daniel's Body Shop. The tractor was on the list of assets transferred to Western Express. Daniel's Body Shop, however, had repaired the tractor and would not release it to Western Express until Western Express paid the repair bill. The trial court granted Mr. Tate summary judgment "[f]or the reasons stated in plaintiff's memorandum." This memorandum is not, however, in the record.[1]

Western Express fails to cite a provision in the Agreement wherein Mr. Tate agreed to be responsible for this alleged debt of Deaton that Western Express paid. The Agreement was effective "as of" March 31, 2003 which was called the "Effective Date." The date the assets were actually transferred under the Agreement to Western Express was April 30, 2003 which was called the "Closing Date." The bill for Daniel's Body Shop repair is dated April 3, 2003. Whatever may have been the arrangement between Western Express and Deaton about who is to pay for repairs to the assets awaiting transfer between the Effective Date and the Closing Date, Western Express fails to

[1] If trial courts elect to adopt the reasoning in parties' memorandum, it would be preferable to attach it to the order so the court on appeal can have the benefit of the reasoning adopted by the trial court. Such memoranda are not routinely included in the appellate record. *See* Tenn. R. App. P. 24.

cite a provision whereby Mr. Tate as Principal is responsible for such repair costs. We affirm the trial court's order granting summary judgment on this amount.

IV. RULE 41.02 ORDER

The trial court declined to grant Mr. Tate summary judgment on two of the claims made by Western Express, namely, that he was responsible for missing equipment and that he was responsible for a payment made by Western Express to Tate Enterprises, Inc. At the trial of these matters, the trial court granted Mr. Tate's motion under Rule 41.02 and dismissed the remaining two claims.

The Tennessee Supreme Court has recently articulated the standard of review when a trial court grants a dismissal under Rule 41.02:

> When a motion to dismiss is made at the close of a plaintiff's proof in a non-jury case [under Rule 41.02], the trial court must impartially weigh the evidence as though it were making findings of fact and conclusions of law after all the evidence has been presented. *See City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn. 1977). If a plaintiff's case has not been established by a preponderance of the evidence, then the case should be dismissed if the plaintiff has shown no right to relief on the facts found and the applicable law. *Id.*; *Atkins v. Kirkpatrick*, 823 S.W.2d 547, 552 (Tenn. Ct. App. 1991). The standard of review of a trial court's decision to grant a Rule 41.02 involuntary dismissal is governed by Rule 13(d) of the Tennessee Rules of Appellate Procedure. *Atkins*, 823 S.W.2d at 552.

Building Materials Corporation v. Britt, 211 S.W.3d 706, 711 (Tenn. 2007). Thus, we review the trial court's findings of fact *de novo* with a presumption of correctness. Tenn. R. App. P. 13(d).

A. Tractors and Trailers Listed in Agreement

Western Express claims that Deaton sold 5 tractors and 4 trailers worth a total of $168,000 to Western Express under the Agreement that Western Express never received. In its summary judgment order, the trial court found that under Section 6.1(j), Mr. Tate agreed to be liable for any equipment listed as part of the sale but not provided to Western Express. Section 6.1(j) provides as follows:

> 6.1 REPRESENTATIONS AND WARRANTIES OF SELLERS AND PRINCIPALS. Sellers and Principals represent and warrant to Buyer as of the date hereof and as of any Interim Closing or the Closing, as follows:
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> . . .
>
> J. DISCLOSURE. All information which has been provided or which will be provided to Buyer in connection with this transaction is and will be true and correct

> as of any Interim Closing or at the Closing Date in all material respects. No representation or warranty made in this Agreement or as provided herein contains any known untrue statement of a material fact or omits to state a known material fact necessary to make the statements contained herein not misleading.

The Agreement included schedules listing the assets to be transferred. We agree with the trial court that under Section 6.1(j) Mr. Tate represented to Western Express that the equipment listed on the schedules would be transferred to Western Express. Therefore, Mr. Tate could be liable for breach of this provision. There is no dispute that the tractors and trailers at issue were included in the schedules of items sold to Western Express.[2]

The trial court having concluded that Mr. Tate had an obligation under the Agreement, a trial was then held on whether there was a breach of this obligation, *i.e.*, whether Western Express received the tractors and trailers as represented by Mr. Tate under the Agreement. At the close of the proof presented by Western Express, the trial court found that Western Express "failed to make out a prima facie case to establish that those tractors or trailers were either missing or stolen." Alternatively, the court also found the proof regarding the value of the equipment was "speculative."[3]

It does not appear that an inventory was done at the time the deal was closed to identify missing equipment or to establish what equipment was actually delivered. Western Express argues that it proved at trial that it did not, in fact, receive the tractors and trailers. The Western Express controller, William Garland, testified that if the tractors were operating, then they would be shown as moving in the Western Express computer system. Since the missing tractors and trailers were not so shown in the system, Western Express argues that it proved the equipment was never transferred to Western Express.

We agree with the trial court. Western Express's proof showed only, or at most, that the missing equipment was not moving on Western Express system. The proof did not show Western Express failed to receive the equipment.

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[2] At trial, Western Express acknowledged that their claim was incorrect and that actually there were four (4) tractors and three (3) trailers missing.

[3] Western Express offered its used equipment manager, Scott Summers, to testify as to the value of the missing tractors and trailers. Mr. Summers did not work for Western Express when these assets were acquired and never examined them. Mr. Summers was frank in his testimony about the difficulty in placing a value on equipment he had not seen. He was not asked to look at Deaton's records about this equipment to help in his valuation. He acknowledged that there is "loss of variables in this with tires and miles and condition." He used phrases such as "guesstimate." He gave a value range for the tractors to be within the $26,000 to $40,000 range. Because of our resolution of the issue, we need not address the trial court's speculative value determination.

On appeal, Western Express cites Section 12.1(a)[4] of the Agreement in support of recovery. That section clearly is not a substantive representation by Mr. Tate and does not constitute any additional representation not made elsewhere in the Agreement. It merely provides that any representation shall survive closing.

Since Western Express failed to proved a breach of the Agreement by Mr. Tate, we affirm the trial court's dismissal of this claim.

B. Payment to Tate Enterprises

On June 23, 2003 Western Express paid Tate Enterprises, Inc. $51,234.35 related to a call on a letter of credit. Western Express claims that this was paid in error and seeks to recover the erroneous payment from Mr. Tate and, in any event, claims that this is not a liability assumed by Western Express under the Agreement. At the summary judgment phase, the trial court found it needed to take evidence on "the facts surrounding the payment."

The trial court dismissed this claim at the close of Western Express's proof since it found no breach of the Agreement related to this matter. The trial court also found the payment was not for a personal debt of Mr. Tate and was paid to a corporation and not Mr. Tate personally. Western Express argues that it made this payment erroneously and that Mr. Tate is responsible for the debt.

Western Express cites no Agreement provision that it claims Mr. Tate breached. Thus, like the trial court, we are not provided with an Agreement-based ground for any obligation on Mr. Tate with regard to the erroneous payment. If paid in error, it was paid to a corporation, not Mr. Tate. The erroneous payment claim should be addressed to the corporation and not Mr. Tate individually.

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[4] Section 12.1(a) provides as follows:

> SECTION 12.1(A) SURVIVAL OF REPRESENTATIONS AND WARRANTIES. The representations and warranties made by Sellers and Principals, including, without limitation, statements contained in any certificate or schedule delivered by Sellers to Buyer pursuant to this agreement shall survive the Closing and be fully enforceable at law or in equity against Sellers and Principals, their successors and assigns, by Buyer and its successors and assigns. The representations and warranties made by Buyer, including, without limitation, the obligation to make payments contemplated to be made by Buyer to Sellers as part of the Purchase Price and all statements contained in any certificate delivered by Buyer to Sellers pursuant to this Agreement, shall survive the Closing, and shall be fully enforceable at law or in equity against Buyer and its successors and assigns, by Sellers and its successors and assigns.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against appellant, Western Express, Inc.

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PATRICIA J. COTTRELL, JUDGE